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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of YADIRA and ISAAC
GONZALEZ.

YADIRA GONZALEZ,

Appellant,

v.

ISAAC GONZALEZ,

Respondent.

F075777

(Super. Ct. No. BFL-15-001932)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Cynthia L. Loo, Commissioner.

Bobby Cloud Law and Bobby L. Cloud, Jr., for Appellant.

No appearance for Respondent.

-ooOoo-

Yadira Gonzalez (mother) appeals from orders awarding sole legal and physical custody of her then 15- and 12-year old sons to their father, Isaac Gonzalez (father), and granting her supervised visitation. Mother contends she was entitled to an evidentiary

hearing before the trial court made its permanent custody order. She also contends the trial court abused its discretion in finding it was the boys' best interest to award father custody. We agree the trial court deprived mother of an opportunity to be heard before awarding father custody. We therefore reverse the trial court's custody order and remand to the trial court to conduct an evidentiary hearing.

FACTUAL AND PROCEDURAL BACKGROUND

Mother filed a request for a domestic violence restraining order in April 2015, in Kern County Superior Court case No. S-1501-FL-631516. Mother sought protection from father, whom she married in December 2000, for herself and the couple's sons, 12-year-old I. and 10-year-old E., as well as her parents. On February 13, 2015, the family lived in a studio apartment in front of a main house where mother's extended family lived. Mother alleged father struck her on the back of the head during an argument and she lost consciousness when father put his hands around her neck. Mother's family heard the argument and came into the apartment to find father on top of mother. The police were called; they issued an emergency restraining order and arrested father for spousal abuse. Mother and father separated that day.

Mother further alleged she had suffered daily physical and emotional abuse from father throughout their marriage, and father physically and emotionally abused their sons, who were afraid of father.

After a hearing on May 11, 2015, with both parties represented by attorneys, the trial court granted mother a temporary restraining order (TRO), which protected mother, the boys, and the maternal grandparents. The trial court granted sole legal and physical custody to mother with no visitation for father. A further hearing was set for June 15, 2015. Father filed a response, in which he denied abusing mother and the boys, and asked that the request for restraining order be denied. Father was not opposed to the boys living with mother, but he wanted visitation. At the June 15, 2015 hearing, the trial court granted father twice weekly supervised visits and ordered the TRO to remain in place

until the next hearing.¹ The TRO, and custody and visitation orders, were reissued multiple times over the course of the proceedings—each time the orders were extended until the next hearing date.

In January 2016, the parties stipulated to participate in a family evaluation pursuant to Evidence Code section 730 conducted by Dr. Robert L. Suiter. Suiter was to provide recommendations for primary physical custody of the boys and an appropriate visitation schedule. The parties agreed to cooperate with Suiter in conducting the evaluation by making themselves and the boys available to him. The parties further agreed Suiter's report would be admitted into evidence without objection for lack of foundation, lack of the expert's qualifications, and hearsay. The parties, however, were not stipulating to Dr. Suiter's conclusions. Moreover, neither party was prohibited from calling Suiter, or any other mental health professional, as an expert witness pursuant to Evidence Code section 733. Suiter was appointed on April 14, 2016, and he filed a declaration of his qualifications on May 23, 2016.

At a hearing on November 7, 2016, on the order to show cause regarding domestic violence, and child custody and visitation, at which father and mother appeared, mother told the trial court she had not been able to meet with Suiter and an appointment was set for the end of the month. The court continued the matter to December 5, 2016, for the status of Suiter's evaluation and reminded the parties that failure to obey court orders may be the basis for a change in custody. The TRO was ordered to remain in full force and effect pending further hearing.

¹ Father filed for dissolution of the marriage on July 31, 2015, in Kern County Superior Court case No. BFL-15-001932. In May 2016, the dissolution proceeding was consolidated with a child support proceeding. In December 2016, the domestic violence restraining order proceeding, case No. S-1501-FL-631516, was consolidated with dissolution and child support proceedings, and the dissolution proceeding, case No. BFL-15-001932, became the lead case.

On January 18, 2017, the trial court granted the motion of mother's attorney to be relieved as counsel. Suiter's child custody evaluation report was filed on January 30, 2017. At a hearing held that day on the order to show cause regarding domestic violence, and child custody and visitation, the trial court continued the matter to February 27, 2017, so the parties could review Suiter's evaluation.

In his report, Suiter opined there was inadequate data from which to conclude father physically or sexually abused mother. Mother had demonstrated a pattern of exaggerating symptoms, along with being defensive and attempting to place herself in the most favorable light during psychological testing. The psychological instrument used to assess mother's post-traumatic affective responses did not reflect a pattern of abuse. The boys provided minimal corroboration of mother's abuse, as they recounted only one, and possibly two, instances where father had been physical with mother, and they certainly did not corroborate the frequency of physical abuse mother alleged. Lastly, mother was a very poor historian who had great difficulty providing a coherent history specific to her allegations of physical and sexual abuse by father.

Suiter also opined the data did not support a conclusion that father physically abused the boys. While the boys said father spanked them with a belt at times, which father acknowledged, it did not appear that father spanked them in an abusive manner. The boys, however, were reluctant to be with father, as the spankings disturbed them, and they believed father had been minimally involved with them when they were growing up.

It was clear to Suiter that both boys perceived mother as treating them very well in every respect. The situation had become extremely difficult, however, as father had not had contact with the boys since February 2015.² Even if there was a basis for the boys to

² Father told Suiter that while there was a court order that allowed him to visit the boys twice a week, the visitation monitors were able to cancel visits if they considered the boys to be stressed. Father stated the monitors did not actually pursue the visitation, and if the boys expressed any reluctance or resistance, the monitors would simply cancel the visits. As a result, father had not seen the boys since February 13, 2015.

be hesitant with father, there was an inadequate basis for them to have absolutely no contact with him, even if that was what mother desired. Suiter opined it was in the boys' best interest to remain in mother's primary care, despite her unwillingness to support their relationship with father, and for them to have a relationship with father. Suiter believed there was negligible risk father would physically abuse the boys or that their safety would be compromised by being with him, even in an unsupervised setting. Suiter therefore recommended joint legal custody be awarded to both parents, with mother having primary physical custody, and the boys and father receive counseling to reunify them, with father having increasing amounts of visitation as the counseling progressed.

Mother, who was now representing herself, did not appear at the February 27, 2017 hearing. Father and his attorney were present, as was the boys' attorney. The trial court dismissed mother's request for a domestic violence restraining order with prejudice based on Suiter's findings and mother's failure to appear and prosecute the request. After considering an investigation by the boys' attorney and Suiter's recommendations, the court was "very concerned" that mother was frustrating father's relationship with the boys and father had not exercised visitation since February 2015. The court ordered the boys to participate in reunification counseling with father twice per week. The court's written order contained a warning that mother's failure to cooperate with reunification counseling would be grounds for a change of custody, which the court would entertain at the continued hearing, which it set for March 27, 2017.³ Mother subsequently filed a new request for a domestic violence restraining order on March 1, 2017.

At the March 27, 2017 hearing, the boys' attorney expressed some concerns and a discussion was held regarding compliance with court orders. The trial court admonished mother, who was present, regarding the importance of following the court's orders. The

³ The written findings and order for the February hearing were signed and filed on March 27, 2017. There is no proof of service of the orders in the record.

court dropped the March 1, 2017, request for a domestic violence restraining order from the calendar due to lack of service. The court ordered mother to contact the reunification counselor that day and reiterated the order requiring mother to cooperate with reunification counseling. The trial court warned that if mother failed to contact the counselor and did not cooperate with facilitating counseling between father and the boys, it would consider giving father sole legal and physical custody at the next hearing. The hearing was continued to April 24, 2017.

Mother appeared at the April 24, 2017 hearing with attorney Bobby L. Cloud, who she had recently retained. The trial court continued the hearing to May 24, 2017, so Cloud could review the matter.

Mother and father, as well as their attorneys and the boys' attorney, appeared at the May 24, 2017 hearing, which the court said was regarding a request for order that father filed in 2015 on the issues of custody and visitation.⁴ Mother's counsel lodged an objection to the hearing. The trial court began by recounting the history of the case. The child custody evaluation was not received until January 2017 primarily due to mother's noncompliance. After the evaluation was ordered, there were a number of hearings to "keep on top of the evaluation," and at some point, the court was informed that Suiter would not be able to include mother's information in the evaluation due to her noncompliance. Mother's attorney at the time "did her best to gain mother's compliance." By the end of 2016, mother began to comply and the evaluation was filed on January 30, 2017. The evaluation recognized the boys were bonded with and loved their mother, but it was clear "mother had made a number of serious accusations against the father that were very extreme and could not be supported." In addition, mother "had a chronic unwillingness" to support the boys' relationship with father. It appeared from

⁴ The minutes in the register of actions state the hearing was a review hearing on the petition for child custody and visitation, and counseling.

Suiter's report, as well as the court's own history in dealing with mother, that mother was not able to support the relationship between father and the boys.

The trial court further explained it attempted to institute Suiter's recommendations, including counseling between the boys and father, but there was "little cooperation there." Mother missed a number of court proceedings and it "became so apparent to the Court that mother was doing whatever she could to not comply with the Court's orders and thwart father's visitation that the Court was considering giving custody of the minor children to the father." The court stated it did not want to do that, so it "spent some time yelling at her, telling her how serious this was. And if the Court did not get complete compliance, that's what the Court was going to do." The court ordered mother to comply several times, but "for the boys' sake the Court held off."

The trial court received a letter from the counselor providing reunification therapy to the father and boys, and while the court did not take offense to mother trying to console her children, it did object to mother giving the children nonverbal cues. Over Cloud's objection on foundation grounds, the court considered the letter and read part of it into the record: "[Mother's] demeanor gives the message that they are being traumatized by these visits, and she's made comments to me about it. I believe she's making this a loyalty bind for the boys; that if they speak to their father, they are being disloyal to her. The boys are parentified and often speak of protecting their mother." The court believed mother's behavior throughout the last couple years demonstrated she was not capable of complying with court orders.⁵

The boys' attorney was concerned the boys were made to feel they could not have a relationship with father and she believed the boys deserved to have that relationship, as Suiter recommended. The attorney added the case needed to go forward with Suiter's

⁵ It does not appear that the letter itself was ever marked as an exhibit or entered into evidence. The letter is not in the appellate record.

recommendation, recognizing mother was not helping to foster the boys' relationship with father.

Father's attorney argued it was evident from Suiter's report that mother was reluctant about, if not outright frustrating, father's relationship with the boys. Cloud objected, saying this was "closing argument. You're making a ruling without a hearing. She can either submit, or she can argue against it." The court responded that it wanted to hear from the attorneys. Father's attorney pointed out that Suiter opined mother may be suffering from paranoia and at every hearing father had objected to mother being given additional time to comply. Father's attorney did not believe there was "a next step but to change custody to my client." The attorney was concerned that mother might run with the boys and not abide with a court order changing custody. Father's attorney asked the court, if it was inclined to change custody, that mother's visits be supervised to ensure mother did not make any type of negative comments, either verbally or nonverbally, in front of the boys. Father was willing to continue the boys in counseling. Father's attorney recognized the transition would not be easy, but it must happen or else father stood absolutely no opportunity to reestablish his relationship with the boys.

Cloud stated the case had been going on since 2015 and "[w]e are not setting a hearing. I'm not given an opportunity to cross-examine the 730 evaluator. I'm not given an opportunity to cross-examine the therapist." It seemed to Cloud "the straw that's breaking the camel's back is the [therapist's] letter that has no foundation," which talks about the therapist's belief that "these nonverbal communications that are happening are resulting in this." Cloud had not had an opportunity to review the letter, as he just received it the day before, "[a]nd we're going to change custody on a case that we've left stagnant for over two years." Since Cloud had been on the case, mother had taken the boys to all of the visits and counseling sessions, and had "done everything the Court has asked her," and she would continue to comply with the court's orders. Cloud added they were "making these statements of unsupported accusations that my client made, but

there's never been a hearing. She states that these things happened and that there was an abusive relationship. That's where this all started." Cloud did not see how the court could believe it was in the boys' best interest to change custody, as that was "punishment on the children because they don't want to have a relationship with their dad." If the court did change custody, mother would cooperate with the court's orders.

The trial court responded it was very aware the guiding principle for custody decisions was the best interest of the children and the court is not to punish a child for that parent's behavior. In looking at the child's best interest, the court was considering that children do best when they are allowed to have a relationship with both parents, but that was not happening with mother having control of the boys. The court had spent some time at the hearings speaking to mother, and it specifically told her on March 27, 2017, what was going to happen—that it would give father sole legal and physical custody if she did not comply with the court's orders.

Cloud claimed mother had "complied with every order since I've been on the case." The court "strongly disagree[d]" with this "characterization," as mother had "gotten the message to the children as if she was screaming it in their face by her behavior." After a discussion with counsel about mother having supervised visits, the trial court awarded sole legal and physical custody to father and gave mother supervised visits every other Saturday. Cloud stated he assumed the orders were temporary, since there had not been a hearing, and asked for a "full hearing on this issue," as the orders were made "on lack of foundation, hearsay documents without cross-examination." However, over Cloud's objection, the court said the orders were permanent. The court ordered visitation to be supervised until July 15, 2017, when it would become unmonitored, and set a hearing for August 8, 2017, to address liberalizing mother's visitation. The written findings and orders, filed on June 20, 2017, state the orders were made "[b]ased on the pleadings, 730 child custody evaluation and minors' counsel's investigation, [mother]'s counsel'[s] objection."

DISCUSSION

Mother contends the trial court erred when it denied her an evidentiary hearing on the issue of custody. We review custody and visitation orders for abuse of discretion. (*Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 995–996.) The family law court is vested with discretion to receive evidence. (See *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1327; Fam. Code, § 217, subd. (b) [In making a custody determination, the court has discretion to refuse to receive live testimony for good cause.].) We review the family court’s exercise of discretionary authority for abuse of discretion. (See *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 995.) Under this deferential standard, we must uphold the trial court’s ruling as correct on any legitimate basis. (*Ragghanti, supra*, at pp. 995–996.)

In reviewing any order or judgment we also start with the presumption that the judgment or order is correct, and if the record is silent we indulge all reasonable inferences in support of the judgment or order. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557.) It is the appellant’s burden to demonstrate error. (*Id.* at p. 557.) Even where error is established, we will only reverse where it is reasonably probable that absent the error, the appellant would have obtained a more favorable result. (*Ibid.*) “However, where the error results in denial of a fair hearing, the error is reversible per se. Denying a party the right to testify or to offer evidence is reversible per se.” (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677.)

Although father failed to file a respondent’s brief, that does not diminish mother’s burden to affirmatively demonstrate prejudicial error: “we do not treat the failure to file a respondent’s brief as a ‘default’ (i.e., an admission of error) but independently examine the record and reverse only if prejudicial error is found.” (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203; see Cal. Rules of Court, rule 8.220(a)(2).)

In the seminal case of *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*), our Supreme Court held that at contested family law trials leading to judgment, courts

may not prohibit oral testimony or require parties to present their case at trial by affidavits. (*Id.* at pp. 1355–1357.) The parties have a right “ ‘to present all competent, relevant, and material evidence, bearing upon any issue properly presented for determination.’ ” (*Id.* at p. 1357, italics omitted.) Each party has the right to testify in his or her own behalf, to call witnesses to testify and to proffer admissible evidence. (*Id.* at p. 1357.)

Thus, if the parties are unable to agree on custody, the court must set the matter for an adversarial hearing. (*Elkins, supra*, 41 Cal.4th at p. 1360; Fam. Code, § 3185, subd.

(a).) Where no final judicial custody determination has been made, a full evidentiary hearing, at which the usual rules of evidence apply, is mandatory. (*Elkins, supra*, at pp. 1360–1361.) Family Code section 217 requires that live testimony be permitted at such a hearing unless the parties stipulate otherwise or the court makes a finding of good cause to refuse to receive live testimony.⁶ When determining whether there is good cause to refuse live testimony, the court must consider the rules of evidence as well as:

“(1) Whether a substantive matter is at issue—such as child custody, visitation (parenting time), ...; [¶] (2) Whether material facts are in controversy; [¶] (3) Whether live testimony is necessary for the court to assess the credibility of the parties or other witnesses; [¶] (4) The right of the parties to question anyone submitting reports or other information to the court; [¶] (5) Whether a party offering testimony from a non-party has complied

⁶ Family Code section 217 provides, in pertinent part: “(a) At a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b), the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties. [¶] (b) In appropriate cases, a court may make a finding of good cause to refuse to receive live testimony and shall state its reasons for the finding on the record or in writing.... [¶] (c) A party seeking to present live testimony from witnesses other than the parties shall, prior to the hearing, file and serve a witness list with a brief description of the anticipated testimony. If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing.”

with Family Code section 217(c); and [¶] (6) Any other factor that is just and equitable.” (Cal. Rules of Court, rule 5.113, subd. (b).) If the court ascertains there is good cause to deny the receipt of live testimony, the court must state its reasons for this finding, either orally or in writing. (Fam. Code, § 217, subd. (b).)

Here, since a final custody order had not yet been made, mother was entitled to a full evidentiary hearing on the issue of custody. Where, as here, the court has appointed a custody evaluator under Evidence Code section 730, the requisite evidentiary hearing must involve testimony by the appointed expert. (Evid. Code, § 730 [authorizing court to appoint expert “to testify as an expert at the trial”]; see Fam. Code, § 3115 [no written or oral statement, or conduct, shall constitute a party’s waiver of the right to cross-examine a court-appointed investigator unless the statement or conduct occurred after the party or the party’s attorney received the report].)

Cloud specifically objected to proceeding on May 24, 2017, absent a hearing in which Suiter and the therapist could be cross-examined. After the trial court issued the custody and visitation orders, Cloud objected to the orders being made permanent, as he had not had the opportunity for cross-examination. The trial court did not make a finding of good cause for refusing to receive live testimony or state its reasons for any such finding on the record, other than to state that it understood Cloud’s argument, “and the Court has already articulated why I’m making the ruling that I am.” The articulated reasons showed why the court ordered the transfer of custody, but not why there was good cause for denying mother the right to cross-examine Suiter or the therapist. To the contrary, good cause did not exist, since a substantive matter was at issue; material facts concerning mother’s accusations against father and her conduct relating to the boys’ relationship with father were in controversy; and mother had a right to cross-examine Suiter. Thus, to the extent we may imply a finding of good cause, the trial court abused its discretion in making such a finding.

In these circumstances, the trial court erred by issuing a permanent custody order prior to a full evidentiary hearing. The denial of the fundamental right to offer relevant and competent evidence on a material issue is almost always reversible error. (*Elkins, supra*, 41 Cal.4th at p. 1357.) It is so here. Since we reverse on procedural grounds, we do not address mother's argument the trial court abused its discretion by finding a change in custody was in the boys' best interests.

DISPOSTION

The May 24, 2017 order awarding father sole legal and physical custody of the children is reversed and the matter is remanded to the trial court to conduct an evidentiary hearing. The parties shall bear their own costs on appeal.

FRANSON, J.

WE CONCUR:

LEVY, Acting P.J.

MEEHAN, J.